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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRUCE ALLAN DUTRO, Defendant and Appellant.	A132883 (Contra Costa County Super. Ct. No. 05-090993-7)

Appellant Bruce Allan Dutro, aka Zion Dutro, pled guilty to committing lewd acts on six different children under the age of 14 (Pen. Code, § 288a).[1] The victims were four of his daughters and two of his nieces who were in his custody. He admitted sentencing enhancements under sections 667, 667.61, subdivisions (a) and (d), and 1170.12 (a prior 1995 conviction for lewd and lascivious acts with a child under the age of 14 years, a serious felony), and 667.61, subdivisions (b) and (e) (multiple victims). Pursuant to the plea agreement, 48 other felony counts of sexual assault were dismissed, including 10 counts of forcible rape (§ 261, subd. (a)(2)); three counts of sodomy by threat (§ 286, subd. (c)(3)); one count of sodomy by force (§ 286, subd. (c)(2)); one count of sodomy with a person under 18 (§ 286, subd. (b)(1)); 26 counts of lewd acts on a child (§ 288, subds. (b)(1) & (c)(1)); one additional count of lewd acts on a child under 14 (§ 288a); four counts of oral copulation of a child under 16 (§ 288a, subd. (b)(2)); one count of

[1] All further statutory references are to the Penal Code unless otherwise indicated.

forcible sexual penetration (§ 289, subd. (a)(1)); and one count of sexual battery by restraint (§ 243.4, subd. (a)). He received a stipulated sentence to an indeterminate term of 300 years to life.

Assigned counsel has submitted a *Wende*[2] brief, certifying that counsel has been unable to identify any issues for appellate review. Counsel also has submitted a declaration confirming that Dutro has been advised of his right to personally file a supplemental brief raising any points which he wishes to call to the court's attention. No supplemental brief has been submitted. As required, we have independently reviewed the record. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110.)

We find no arguable issues and therefore affirm.

BACKGROUND[3]

On April 30, 2008, three of Dutro's daughters went to the Antioch Police Department to report years of sexual abuse at the hands of their father, Dutro, and with the knowledge of their mother, Glenda. The victims decided to disclose their abuse when they learned that their parents were attempting to adopt children in Mexico. Jane Doe 1 said that she had been sexually abused by Dutro between the ages of four and 16, during which time she had been repeatedly forced to orally copulate him and had been regularly raped and sodomized by him. Her abuse stopped only after she held a knife to Dutro's throat and threatened to kill him. Jane Doe 2 was subject to forced oral copulation and rape by Dutro between the ages of four and 14. Jane Doe 3 recalled being molested by Dutro as early as age three and a half. Dutro told the victims that he was showing them how "special" they were and how much he loved them. He told them that if you love someone, you should show them by making them feel good. Their mother Glenda sent the victims in to "cuddle" with their father, although she knew they were being sexually

[2] *People v. Wende* (1979) 25 Cal.3d 436.

[3] The facts are set forth in the preliminary hearing testimony of September 9, 10, and 22, 2009, and are summarized in part in a pre-plea report by the probation department.

assaulted.[4] While "cuddling," the victims often pretended to be asleep. If the victims refused to "cuddle" with their father, they would be beaten. Dutro was convicted in 1995 of lewd acts with a child under the age of 14. The victim was another daughter, Jane Doe 4, whom he continued to molest after the conviction. After Dutro's arrest for this offense, he and Glenda talked to all of the girls and told them not to tell the police what was happening to them. Jane Doe 5 and Jane Doe 6 were Dutro's nieces. Jane Doe 5 had been fondled and digitally penetrated by Dutro when she was 11 years old. Jane Doe 6 said that Dutro had fondled and digitally penetrated her when she was between the ages of 11 and 16. During a pretext call made by one of the victims, and recorded by police, the victim confronted Dutro about the abuse she suffered and he apologized for "what I've done to you and your sisters."

On March 29, 2011, the matter was assigned for jury trial. Dutro, represented by retained counsel, and the district attorney advised the trial court of the plea agreement discussed above. Dutro completed a written plea form including a waiver of rights. After voir dire of Dutro, the court found that the plea was "freely, voluntarily and intelligently made with full knowledge of [his] rights and the consequences of [the] plea." Dutro entered his pleas "under the doctrine of *People v. West*."[5] Counsel stipulated that there was a factual basis for the plea based on the police reports and the preliminary hearing transcripts. Dutro was further advised by the court that he was waiving any evidentiary challenge to the truth of the underlying offenses.

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[4] The mother was prosecuted as an aider and abetter. She entered a pleas of guilty to aiding and abetting the commission of each of the six counts to which Dutro pled, with an agreed sentence of 15 years in state prison. She is not a party to this appeal.

[5] *People v. West* (1970) 3 Cal.3d 595 (*West*). In *West* our Supreme Court, following the decision of the United States Supreme Court in *Brady v. United States* (1970) 397 U.S. 742, found that a guilty plea is not compelled and invalid under the Fifth Amendment when " 'motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged. . . .' " (*Id.* at p. 607, fn. 9.) Under *West*, a defendant may enter a plea he believes to be in his best interest, while still maintaining his innocence.

On April 15, 2011, Dutro was sentenced to 25 years to life on each of the six section 288a counts, doubled to 50 years to life due to his "strike" prior (§ 667.61). He was sentenced consecutively on each count, resulting in the agreed sentence under the plea bargain of 300 years to life. The remaining counts and allegations were dismissed. Dutro was ordered to pay $5,270 in victim restitution, a restitution fund fine of $10,000 pursuant to section 1202.4, subdivision (b), and $10,000 pursuant to section 1202.45, which was suspended unless parole is revoked. Dutro was specifically advised of his right to appeal, and agreed to waive that right, with the concurrence of counsel.

On June 15, 2011, Dutro filed a timely notice of appeal, including a request for a certificate of probable cause (§ 1237.5). Dutro indicated his appeal was from the sentence, or other matters occurring after the plea, that he was challenging the validity of his plea, and was also taken on the basis of "New Evidence." His attached declaration complained that he had been "refused the option of pleading no contest," and that he was not given the opportunity to further state on the record that, under *People v. West*, he continued to maintain his innocence. Dutro also claimed that the trial judge refused to allow him to make any statement at sentencing.[6] He contended that one of the victims had since recanted her testimony, and that his retained counsel failed to conduct "further investigation . . . on new discovery." The request was denied by the trial court.

DISCUSSION

"In the case of a judgment of conviction following a plea of guilty or no contest, section 1237.5 authorizes an appeal only as to a particular category of issues and requires that additional procedural steps be taken. That statute provides: 'No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a

[6] The record does not support a claim that Dutro was denied the right of allocution. His counsel was asked if there was anything that he would like the court to consider, and he answered "no." Nothing in the transcript of the hearing indicates that Dutro sought to address the court directly.

written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.' " (*In re Chavez* (2003) 30 Cal.4th 643, 650–651.) "[I]t is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citations.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 74–75 (*Panizzon*); *People v. Mendez* (1999) 19 Cal.4th 1084, 1096.) "[S]ection 1237.5 does not allow the reviewing court to hear the merits of issues going to the validity of the plea unless the defendant has obtained a certificate of probable cause, or has sought and obtained relief from default in the reviewing court. [Citation.]" (*Panizzon*, at p. 75.)

Recognizing that the scope of permissible review in this instance is limited, appellate counsel asks only that we review the record to determine if there are any arguable noncertificate issues. We find none.

The sentence imposed was consistent with the agreed upon terms of Dutro's plea. " ' "When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." [Citation.]' " (*People v. Cuevas* (2008) 44 Cal.4th 374, 383.) "[A] certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement" and the sentence "cannot be challenged without undermining the plea agreement itself." (*People v. Johnson* (2009) 47 Cal.4th 668, 678.) "[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself. Therefore, it [is] incumbent upon [such a] defendant to seek and obtain a probable cause certificate in order to attack the sentence on appeal. [Citation.]" (*Panizzon, supra*, 13 Cal.4th at p. 79.)

Dutro in any event expressly waived his right to any appeal at the time of sentencing. "Just as a defendant may affirmatively waive constitutional rights to a jury trial, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to counsel as a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement. [Citations.]" (*Pannizon, supra,* 13 Cal.4th at pp. 80, 83–84.)

DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.